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**BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON**

PATRICIA A. LONG,)	
)	
Appellant,)	FPAB NO. 94-5
)	
v.)	
)	FINAL FINDINGS OF FACT,
STATE OF WASHINGTON,)	CONCLUSIONS OF LAW
DEPARTMENT OF NATURAL)	AND ORDER
RESOURCES; MONK LOGGING;)	
INC.; and DALKENA COMMUNITY)	
CHURCH,)	
)	
Respondents.)	
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This matter came on before the Honorable William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Dr. Martin R. Kaatz and Robert E. Quoidbach.

The matter is the appeal of an approved forest practices application.

Appearances were as follows:

1. Toby Thaler, Attorney at Law, for appellant.
2. John E. Justice, Assistant Attorney General, for the Washington State Department of Natural Resources;
3. Scott W. Horngren, Attorney at Law, for Monk Logging, Inc., and the Dalkena Community Church.

The hearing was conducted in Spokane, Washington, from May 17 through 20, 1994. In all, four days were devoted to the hearing on the merits.

Gene Barker and Associates, Olympia, provided court reporting services.

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2 Witnesses were sworn and testified. Exhibits were examined. The Board viewed the
3 site of the proposal in the company of Judge Harrison and the parties. From testimony heard
4 and exhibits examined, the Forest Practices Appeals Board makes these

5 **FINDINGS OF FACT**

6 I.

7 This matter arises near Furport in Pend Oreille County. It concerns a dispute over
8 proposed timber harvesting, the effect of that harvesting upon groundwater and wildlife as well
9 as the procedure used in approving the timber harvest. We take the issue of procedure first,
10 followed by groundwater and wildlife.

11 II.

12 Procedure. Respondent Dalkena Community Church, acquired land by charitable
13 donation. The Church proposes to harvest timber on the land to raise money to build a youth
14 camp on a portion of the property. To harvest timber, the Church must have an application
15 approved by respondent Washington State Department of Natural Resources (DNR).

16 III.

17 The Church chose Mr. Franklin J. Monk and Monk Logging, Inc. as its harvest
18 operator. In the fall of 1993, Mr. Monk approached Mr. Bob Hartley, DNR Forester, for
19 advice. Mr. Hartley had recently served notice of early retirement with DNR and determined
20 to start a private forestry consulting business. While still serving as DNR Forester, Mr.
21 Hartley agreed to lay out the harvest for the Church as a private contractor. He sought and
22 obtained permission from his DNR supervisor to do so. Mr. Hartley visited the Church
23 property and drew up plans for the protection of wetlands and for leaving nest-cavity wildlife
24 trees. The Church or Mr. Monk compensated Mr. Hartley for this service. Mr. Hartley, at
25 that time, was an employee of DNR.

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2 IV.

3 While Mr. Hartley was still an employee of DNR on December 21, 1993, the Church
4 and Mr. Monk filed a forest practices application with DNR reflecting the work done by Mr.
5 Hartley as a private contractor. Mr. Hartley did not act upon the application. Rather, he
6 transmitted it to other DNR employees. Mr. Hartley retired from DNR at the end of 1993.
7 On January 5, 1994, the Church's application was approved by DNR.

8 V.

9 The community of Furport became sharply divided over the approved application.
10 Those opposed were critical of the role played by Mr. Hartley in the processing of the
11 application. On January 31, 1994, Patricia A. Long filed a Notice of Appeal from the
12 application. Ms. Long's homesite of 26 acres is surrounded on three sides by the Church
13 lands approved for harvest in the application.

14 VI.

15 The application, as originally approved, allowed harvest on approximately 160 acres.
16 In March 1994, following this appeal, the Church wrote to DNR withdrawing all but
17 approximately 80 acres. The site now at issue consists of that 80 acres which is located north
18 of Ms. Long's homesite. The Church does not intend to convert this 80 acres of timber land
19 to another use.

20 VII.

21 During the trial of this matter, the Church stipulated that access and to and from the 80
22 acres will be from the north, thus eliminating an access road across Ms. Long's property from
23 this application.

VIII.

Groundwater. Appellant, Ms. Long, urges that the approved 80 acre harvest will reduce the amount of water available to her shallow domestic well. She urges that this will occur in one or both of two ways. First, that logging will upset the water balance leaving less recharge of groundwater. Second, that logging equipment operating on the surface of the ground will cause the breakage of below-ground clay layers, which confine ground water, and allow the ground water to escape to lower levels. It is improbable that either will occur.

IX.

A "water balance" comes from the natural processes which add or subtract water from the earth. Rain and snow add water. Water is subtracted by 1) evaporation 2) underground recharge and 3) runoff. In forested areas, water is also diverted from the earth by the evapotranspiration of water from trees and the interception of rain and snow on tree branches.

X.

Currently, on the forested site in question, trees evapotranspire or intercept large amounts of water. After harvest, that water will be available to recharge the underground waters serving appellant's well. There is no significant surface runoff.

XI.

Harvesting will also remove the forest canopy hastening evaporation to some extent and allowing wind to blow snow from the site. Because the sandy loam soil does not promote water ponding, the negative effect of increased evaporation is likely to be slight. So too, is the effect of blowing snow. The negative effect of these factors on the water balance is likely to be overcome by the positive effects of increasing the available water through eliminating evapotranspiration and interception.

1
2 XII.

3 The proposed harvesting is likely to increase groundwater recharge, and the water
4 available to appellant's well and other wells in the vicinity.

5 XIII.

6 A "confining clay layer" lies some 26 feet below the site. This supports groundwater
7 above. The land surface is relatively flat on the site. As one leaves the site walking south,
8 one enters the Long property where the surface runs downhill. The declining surface intersects
9 the confining clay layer on the Long property. Water emerges from the ground, at a common
10 elevation, both in a forested wetland and at springs on the Long property. The places where
11 this water emerges mark the intersection of land surface with this confining clay layer. That
12 layer is above the Long well which is fed by runoff from the forested wetland. There may
13 also be a clay layer beneath the Long well.

14 XIV.

15 The activity of logging equipment on the site might damage a clay layer, were it no
16 more than one or two feet below ground. The equipment is unlikely to affect in any way the
17 confining clay layer some 26 feet below ground which serves as a collector for appellant's
18 well.

19 XV.

20 It has not been shown that the proposed operation of logging equipment is likely to
21 damage any confining clay layer. Accordingly, no groundwater is likely to escape by that
22 means.

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2 XVI.

3 Neither underground waters, nor appellant's well nor any well is likely to be adversely
4 affected by the proposed logging operations.

5 XVII

6 Wildlife. The proposed forest practices lie within a larger area identified by the
7 Washington Department of Wildlife (WDW) as a medium density white-tail deer winter range.
8 This was communicated by WDW to DNR in a letter dated February 25, 1994. The site is not
9 a significant winter range for other big game species.

10 XVIII.

11 The records of game maintained by WDW show that, for the management unit
12 containing the site, the deer harvest is increasing.

13 XIX.

14 The February 25, 1994 letter from WDW to DNR stated:

15 *Providing clumps of conifer trees in the eastern half of section 25*
16 *[the site] from one half acre to three acres in size, with trees at*
17 *least 40 feet tall providing 60-70 percent canopy closure, would*
18 *retain some of the existing thermal winter cover. [Brackets added]*

19 The DNR did not condition the approved forest practices application to require the clumps of
20 conifers as described by WDW. Testimony in this matter indicated that about 10 clumps of
21 conifers would be appropriate. That would require leaving 5-30 acres of conifers.
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2 XX.

3 The respondent applicants, the Church and Monk Logging, Inc. have stipulated at the
4 trial of this matter to leave most trees of 10" dbh or less. They have also stipulated to leave
5 wetland and cavity-nest trees. That stipulation was reduced to writing and submitted as exhibit
6 R-19. The resulting appearance of the harvested area would then resemble the lands shown in
7 exhibit R-18 (Appendix C hereof). These are nearby lands of Idaho Forest Industries logged
8 in 1993. The appearance would be like exhibit A-11 (Appendix D hereof) only in those areas
9 dominated by lodgepole pine and estimated to comprise no more than 20 acres of the 80 acres
10 in question. The effect of leaving this understory and other selected trees would be to provide
11 beneficial cover for deer and other wildlife.
12

13 XXI.
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15 The approved application was not conditioned to protect big game winter range as such.
16 The application was conditioned for wetland management and cavity-nest wildlife leave trees.
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18 XXII.
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20 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

21 From these Findings of Fact, the Board issues these:
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CONCLUSIONS OF LAW

I.

There are two issues in this case. The first is whether DNR properly classified the application as Class III rather than Class IV - Special, requiring State Environmental Policy Act (SEPA) review? The second is whether DNR properly conditioned the application to prevent any potential for material damage to a public resource? We take these up in turn.

II.

Class III v. Class IV - Special. The rule classifying forest practices is WAC 222-16-050. No category within WAC 222-16-050 (1) relating to Class IV Special encompasses this case. The categories enumerated at WAC 222-16-050 (1) purport to be a closed end list. WAC 222-16-050 (5). Under that forest practices rule, the application is Class III.

This Appeals Board has authority to review, when at issue, the validity of a forest practices rule, as applied. Friends of the Columbia Gorge, et. al. v. DNR, et. al., FPAB No. 93-61, pp. 8-12 (1993) and cases cited therein. That review is to determine not only the application's consistency with forest practice rules but also its consistency with governing statutes including SEPA and the Forest Practices Act. Id. While appellant apparently urges this type of review, the validity of the forest practices rules as applied has not been placed at issue within the Pre-Hearing Order. It therefore cannot be considered. WAC 223-08-100(5).

Class III applications are categorically exempt from SEPA. However, categorical exemptions are limited under WAC 197-11-305(1) for any proposal where cumulative effects are involved. Snohomish County v. State, 69 Wn. App. 655, 668 (1993). The appellant has not shown that this and related logging practices, conducted under the Forest Practices Act and regulations, will have a cumulative effect which raises a potential for a significant adverse

1
2 impact on groundwater, wildlife or other aspects of the environment. The application at issue
3 is therefore categorically exempt from SEPA.

4 III.

5 Public Resources. The DNR has the authority to condition applications "to avoid
6 material damage to a public resource". Snohomish County and Washington Environmental
7 Council v. DNR, DOE, et. al. FPAB Nos. 89-12 and 13, pp. 37-38 (1989) reviewed on other
8 grounds, 69 Wn. App. 655, 850 P.2d 546 (1993), pet. for review denied 123 Wash. 2d.
9 1003(1994). See RCW 76.09.080(1)(C) and RCW 76.09.090. These can be site specific
10 conditions which go beyond standard forest practices rules, if necessary to avoid material
11 damage to a public resource. Id.

12 IV.

13 Public resources consist of water, fish and wildlife, and capital improvements of the
14 state or its political subdivisions. RCW 76.09.020(13). The groundwater serving appellant's
15 well is a public resource. So is wildlife, including deer.

16 V.

17 The proposed forest practices have not been shown to pose a potential for material
18 damage to groundwater, nor to appellant's well nor to any well. The application approval by
19 DNR was appropriate in respect to groundwater resources.

20 VI.

21 The proposed forest practices, with regard to wildlife, are subject to the following
22 standard forest practices rule:

23
24 *(10) Wildlife habitat. This subsection is designed to*
25 *encourage timber harvest practices that would protect wildlife*
26 *habitats, provided, that such action shall not unreasonably*

1 restrict landowners action without compensation.

- 2 (a) The application should make every reasonable
3 effort to cooperate with the department of wildlife
4 to identify critical wildlife habitats (state) as
5 defined by the board. Where these habitats are
6 known to the applicant, they shall be identified in
7 the application or notification.
- 8 (b) Harvesting methods and patterns in established big
9 game winter ranges should be designed to insure
10 adequate access routes and escape cover where
11 practical.
- 12 (i) Where practical, cutting units should be
13 designed to conform with topographical
14 features.
- 15 (ii) Where practical on established big game
16 winter ranges, cutting units should be
17 dispersed over the area to provide cover,
18 access for wildlife, and to increase edge
19 effect.
20 WAC 222-30-020(10). Emphasis added.

21 VII.

22 In this case it is practical and not unreasonable to provide deer access routes and cover
23 by leaving the understory and other selected trees as stipulated by the respondent applicants.
24 Those stipulated conditions should be added to the approved application to achieve compliance
25 with WAC 222-30-020(10) in its protection of big game winter range. Once added, such
26 conditions are mandatory as an expression of what is reasonable and practical with respect to
27 the site in question.

IX.

It would not be reasonable or practical, and therefore is not required by
WAC 222-30-020(10), to set aside 5-30 acres as appellants interpret the comments in WDW's
letter.

1
2 X.

3 With the addition of the conditions stipulated by the respondent applicants, no further
4 conditions are necessary. As so conditioned, the approved forest practices are not likely to
5 cause material damage to wildlife.

6 XI.

7 The application should be remanded to DNR for addition of the conditions stipulated by
8 the respondent applicants and, as so conditioned, should be affirmed.

9 XII.

10 The dual role of the DNR Forester as public official and private consultant does not
11 justify reversal of this application's approval. Our review is de novo, WAC 223-08-177. The
12 record independently made before us justifies the application's approval. However, the public
13 confidence which stems from an avoidance of a dual role might, in a future case, allow matters
14 to be resolved without an appeal. The DNR should re-examine its policy with regard to
15 private contracting by its foresters.

16 XIII.

17 We have carefully examined appellant's other contentions and find them to be without
18 merit.

19 XIV.

20 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

21 From the foregoing, the Board issues this:
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ORDER

The application is remanded to Department of Natural Resources for addition of the conditions stipulated by the respondent applicants (set out in Appendices A & B hereof). As so amended, the application's approval is affirmed.

DONE this 22nd day of June, 1994.



HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD



DR. MARTIN R. KAATZ, Member



ROBERT E. QUOIDBACH, Member

F94-5F

APPENDIX A

1. Permittee agrees to leave the size and number of wildlife and wetland management zone reserve trees as listed in appendix B and as marked in the field. Permittee can cut a reserve tree for safety, for operational reasons, or a reserve tree that is damaged during logging, provided that permittee leaves a replacement tree of like size.
2. Permittee agrees to leave understory trees up to a size of 8 to 10 inches d.b.h. in the area between feller buncher corridors. Provided, that permittee can cut all sizes of lodgepole pine trees. In areas dominated by lodgepole pine with a limited understory, estimated to be approximately 15 to 20 acres, permittee agrees to leave 8 to 10 seed trees per acre.
3. Permittee agrees to eliminate use of the south road across the Long property.

APPENDIX B

FURPORT MARKING - 80 ACRE UNIT

SPECIES	WILDLIFE DEAD	TREES GREEN	GREEN TREES >10"	<10"	DOWN LOGS
DF	60	8	27	7	90
LP	33	7	0	1	3
PP	8	2	39	10	13
WL	31	1	176	37	9
GF	13	1	3	3	5
RC	9	9	3	0	4
WP	4	0	21	8	1
SP	4	0	39	7	0
HDWD					
MARKED	7	0	0	0	0
UNMARKED	<u>20</u>	<u>0</u>	<u>50</u>	<u>0</u>	<u>5</u>
TOTAL	180	28	358	73	130
	208				
REQUIRED FP 75 AC.	150		150		150
EXCESS/SHORT	+58		+201		-20

Old Fence Corner



Non-forested
Small B
Wetland #2

Type 1

Area with
Scattered
Forested
and
Non-forested
Wetlands
(All small)

25'
WMZ

#3

Non-forested
Wetland
Small B
25' WMZ

3.2 Ac

0.5 Ac

#4

Type 2
Dry Ground

Area without
wetlands

Forested
Wetland

Cabin

Metal Fence Post

E 1/2 NE 1/4 Section 25 T32N R44E

Legend:

Road = = =

Fence x x x

Good Corner ◆

Aproximate
corner ○

Type Change - - -

WMZ boundary

* Note: Type 1 needs to be logged in dry or frozen conditions so that skidding equipment or logs do not rut forested wetlands. Other 1 or 2 non-forested type B wetlands are less than 0.5 acre, but must not be skidded through.

Drawn 10-31-93

Scale 1" = 330 Feet

emanance of Old
Fence Intersection

WETLAND #4

ACREAGE OF WETLAND = 0.52 ACRE

ACREAGE OF WMZ - 25' X 840' = 0.5 ACRE

	4"-12"		12"-20"		20"+
	C	H	C	H	C
TOTAL TREES	49	33	22	4	2
TREES CUT	9		13		0
TREES LEFT	40	33	13		2
	73		13		2
REQUIRED FP	23		13		2

WETLAND DESCRIPTIONS

WETLAND #1

ACREAGE OF WMZ - 100' X 455' = 1.0 ACRE

	4"-12"	12"-20"	20"+
TOTAL TREES	228	42	0
TREES CUT	63	12	0
TREES LEFT	155	30	0
REQUIRED FP	45	25	5

WETLAND #2

ACREAGE OF WMZ - 25' X 167' = 0.1 ACRE

	4"-12"	12"-20"	20"+
TOTAL TREES	30	11	0
TREES CUT	1	3	
TREES LEFT	29	8	
REQUIRED FP	5	3	1

WETLAND #3

ACREAGE OF WMZ - 25' X 1520' = 0.9 ACRE

	4"-12"		12"-20"		20"+
	C	H	C	H	C
TOTAL TREES	45	60	47	8	11
TREES CUT	5		24		6
TREES LEFT	40	60	23	8	5
		100		31	5
REQUIRED FP	41		23		5

EXHIBIT

R-10

APPENDIX C



INFORMATION ON EXHIBITS

Please notify Ms. Robyn Bryant of this office within 30 days of the date of this order if you will be arranging to have your oversized exhibits retrieved.

If you do not notify us, absent an appeal, the exhibits will be discarded. If the matter is appealed, the exhibits are sent to Superior Court.

APPENDIX D

